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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re N.L., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

N.L.,

Defendant and Appellant.

A146273

(Alameda County
Super. Ct. No. SJ130220801)

Appellant N.L. was ordered to pay over \$400,000 in direct victim restitution after he was declared a ward of the juvenile court based on his admission of arson of an inhabited structure. (Welf. & Inst. Code, §§ 602, 730.6; Pen. Code, § 451, subd. (b).) He contends the restitution order was deficient in several respects and must be set aside. The People agree portions of the award were insufficiently documented and may be unauthorized. We remand the case for a new restitution hearing.

I. FACTS AND PROCEDURAL HISTORY

In December of 2013, appellant (then 17 years old) set a series of fires, three involving occupied homes, and two involving a residential construction site. The Alameda County District Attorney filed a first amended wardship petition alleging one count of residential burglary, three counts of arson of an inhabited structure, and two counts of arson of a structure. (Pen. Code, §§ 459, 451, subds. (b) & (c).)

Counts 1 and 2, for arson of an inhabited structure and burglary, arose from a fire appellant set in the garage of Alison Joy while she and her teenage son slept. Appellant was discovered by a sheriff's deputy hiding in some bushes near the house. Count 3, for arson of an inhabited structure, involved a condominium in the complex where appellant lived with his parents. It was owned by Dominick and Janice Soldano, who awoke one night to find a portion of their home engulfed in smoke and escaped by climbing onto their roof. Count 4, for arson of an inhabited structure, involved the home of John and Caren Belbey, who awakened to a bench burning on their front porch and extinguished the fire. Counts 4 and 5 involved small fires set inside homes under construction.

Appellant admitted Count 1, arson of an inhabited structure, with the remaining counts to be dismissed and victim restitution to remain open on all counts.¹ At the dispositional hearing concluded on February 20, 2014, appellant was committed to the Division of Juvenile Justice. This court affirmed the disposition in a prior appeal. (*In re Noah L.* (June 27, 2014, A141207) [nonpub. opn.])

On June 18, 2014, the court ordered appellant to pay \$549.50 in direct victim restitution to Standard Pacific Homes, the developer of the unfinished homes damaged in counts 5 and 6.² In a hearing held January 29, 2015, the court noted the Belbeys, the victims of count 4, were not requesting restitution but had elected to proceed through their insurance company. Alison Joy, the victim of counts 1 and 2, had not decided whether to request restitution.

On March 30, 2015, the probation officer filed a memorandum advising the court the victims of count 3, Dominick and Janice Soldano, "reported a total loss of

¹ Under *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*), a plea bargain will ordinarily be construed to contain an agreement that dismissed counts will not be considered when reaching a sentencing decision. The *Harvey* rule has been held inapplicable to juvenile wardship proceedings, and appellant does not assert it pertains to this case. (*In re T.C.* (2009) 173 Cal.App.4th 837, 849; *In re Jimmy P.* (1996) 50 Cal.App.4th 1679, 1683.) In any event, appellant implicitly waived any rights he might have under *Harvey* by agreeing restitution would remain open on all counts.

² This amount is not contested on appeal.

\$436,413.29 plus approximately \$20,000 in out-of-pocket expenses to replace household goods. This amount includes: \$56,283.53 for temporary housing, \$141,649.98 for personal property, \$26,917.29 for ‘dwelling-building items,’ and \$211,562.49 to repair the structure. E-Mail correspondences with Mr. Soldano are attached for the Court’s review.” The probation officer recommended the court issue an order requiring appellant to pay \$436,413.29.

In one of the email messages attached to the probation officer’s memorandum regarding restitution, Dominick Soldano listed payments made by USAA Insurance Company to the Soldanos directly and to third party vendors such as Oakwood Corporate Housing and Paul Davis Restoration East Bay. This list, captured in a screenshot, showed USSA had paid \$56,283.53 for “Loss of Use—Additional Living Expense,” \$141,649.98 for “Personal Property—All Other Personal Property,” and \$26,917.29 for “Dwelling-Building Items—All Other Building Items.” In another thread of email messages, Dominick Soldano forwarded a message from the manager of the homeowners association of the complex (HOA) stating that Farmer’s Insurance, the insurer for the HOA, “reports the total cost at \$211,562.49 which includes the deductible paid by the HOA.” Dominick Soldano indicated in another message he did not have receipts for much of the \$20,000 in out-of-pocket expenses.

Appellant’s trial counsel filed written opposition to the Soldanos’ request for restitution, arguing the amount exceeded that which was necessary to rehabilitate appellant and would result in a windfall to the extent the losses had been covered by insurance. Attached were documents showing appellant’s parents had signed a \$20,000 promissory note to settle an action brought by Farmers Insurance to recoup the amounts paid to repair the structural damage to the Soldanos’ home.

The prosecution filed a written response to appellant’s opposition to the amount of restitution, arguing appellant was responsible for the full amount of the loss notwithstanding any insurance reimbursement. Attached as an exhibit was an itemized statement from Farmers Insurance showing the cost of repairing the structure (totaling \$211,562.49) and a “Claims Detail” statement from USAA Insurance (largely duplicative

of the list of payments included in the emails between Dominick Soldano and the probation officer) showing the payments issued to the Soldanos and third party vendors (\$56,283.53 for “Loss of Use—Additional Living Expense,” \$141,649.98 for “Personal Property—All Other Personal Property,” and \$26,917.29 for “Dwelling-Building Items—All Other Building Items”).

A restitution hearing was held July 9, 2015, at which no witnesses were called. The prosecutor clarified that two insurance companies were involved in the Soldanos’ claim: Farmers Insurance, the carrier for the HOA that was responsible for the structural damage to the condominium, and USAA, the Soldanos’ own insurance carrier. The prosecution acknowledged appellant was entitled to an offset for amounts paid by his parents to settle claims by the insurance companies, and indicated the Soldanos were abandoning their claim for unreimbursed out-of-pocket expenses because they did not have documentation .

The trial court took the matter under submission and on September 2, 2015, issued a written order requiring appellant to pay Dominick Soldano the sum of \$436,413.29. The issue of restitution was reserved as to victims Alison Joy and the Belbeys.

II. DISCUSSION

Appellant argues the evidence submitted by the Soldanos in support of their restitution claim was insufficient to support the amount awarded. The People appropriately agree the case must be remanded for further proceedings because the record is inadequate to permit a review of the restitution award.

A. Victim Restitution in Juvenile Cases—General Principles

Crime victims in California have a state constitutional right to obtain restitution from the perpetrator of a crime for economic losses suffered. (Cal. Const., art I, § 28, subd. (b); *In re Tommy A.* (2005) 131 Cal.App.4th 1580, 1587.) Direct victim restitution in a juvenile case is governed by Welfare and Institutions Code section 730.6, which tracks the adult offender restitution provisions in Penal Code section 1202.4. (*In re M.W.* (2008) 169 Cal.App.4th 1, 4; *In re Anthony M.* (2007) 156 Cal.App.4th 1010, 1016.) “ ‘The purpose of an order for victim restitution [in a juvenile case] is threefold, to

rehabilitate the defendant, deter future delinquent behavior, and make the victim whole by compensating him for his economic losses. [Citation.] . . . [¶] The order is not[,]
however, intended to provide the victim with a windfall. [Citations.]’ [Citation.]” (*In re Travis J.* (2013) 222 Cal.App.4th 187, 204 (*Travis J.*).

Though restitution awards are vested in the sound discretion of the juvenile court, and are subject to review under the deferential abuse of discretion standard, the court does not have the discretion to issue an order not authorized by law or to find facts for which there is no substantial evidence. (*In re K.F.* (2009) 173 Cal.App.4th 655, 661.) “[W]hile a trial court has broad discretion to choose a method for calculating the amount of restitution, it must employ a method that is rationally designed to determine the . . . victim’s economic loss.” (*People v. Giordano* (2007) 42 Cal.4th 644, 663–664 (*Giordano*).

A victim seeking restitution has the initial burden of presenting “an adequate factual basis for the claim.” (*Giordano, supra*, 42 Cal.4th at p. 664.) The court may consider information provided by the victim to the probation officer as prima facie evidence of economic loss, which shifts the burden to the defendant to disprove the amount of loss claimed by the victim. (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1543 (*Gemelli*); *In re S.S.* (1995) 37 Cal.App.4th 543, 546, 547, fn. 2.) However, “[t]he replacement or repair costs of the victim’s property cannot be established simply by statements made by the victim to the defendant’s probation officer.” (*Travis J., supra*, 222 Cal.App.4th at p. 204.) The defense is not required to meet the burden of disproving the loss until the amount of loss is established by the victim. (*Ibid.*)

B. \$211,562.49 for Structural Damage

The direct victim of a crime is entitled to receive the full amount of the loss caused by the crime, even though “in the exercise of prudence,” the *victim* had purchased private insurance that covers some or all of the same losses. (*People v. Birkett* (1999) 21 Cal.4th 226, 246 (*Birkett*); see *People v. Hamilton* (2003) 114 Cal.App.4th 932, 940–941; *In re Brittany L.* (2002) 99 Cal.App.4th 1381, 1389.) As the People acknowledge, \$211,562.49 of the restitution award was for structural damage to the condominium

covered by the HOA's insurance policy with Farmers, rather than the Soldanos' insurance with USAA. From this, we infer it was the HOA that was responsible for repairing the structural damage and that actually incurred the loss—not the Soldanos. The HOA did not request restitution from appellant and appears to have settled its civil claims against appellant and his parents. On remand, the restitution award to the Soldanos must be reduced by \$211,562.49, absent the presentation of additional evidence showing the Soldanos were the parties who in fact incurred the economic loss for the structural damage.

C. Personal Property, Temporary Housing & "Dwelling-Building" Items

The restitution award included \$141,649.98 for damage to personal property, \$56,283.53 for temporary housing, and \$26,917.29 for "Dwelling-Building" items, as calculated by the amount paid by USAA to the Soldanos for these losses. While the insurance payments may not be used to offset the amount of restitution ordered (*Birkett, supra*, 21 Cal.4th at p. 246), they do not automatically establish the amount of the Soldanos' loss, and the information before the court did not supply "an adequate factual basis" for the restitution awarded for these items. (*Giordano, supra*, 42 Cal.4th at p. 664.)

Neither the Soldanos nor a representative of USAA testified or submitted a declaration in support of the restitution claim. The only information provided was the Claim Details list showing payments made by USAA, with the qualification the totals "may not match with the payment details you see on the page" and "[t]he information provided here does not reflect all claim-related details." It therefore appears the list of payments may not accurately reflect the actual payments made by USAA for the losses suffered by the Soldanos. At least one entry, \$32,304.32 to Paul Davis Restoration, indicates a status of "stopped," suggesting that amount may not have been paid. Payments totaling \$92,068.30 to the Soldanos directly are not itemized in any way. The "Dwelling-Building Items" for which payment was apparently made are not described or defined. The \$56,283.53 for temporary housing is not broken down by monthly cost and the nature of the housing is not described; moreover, while the payees listed include

“Oakwood Corporate Housing,” there is no evidence this was where the Soldanos obtained their temporary housing. As the People concede, the case must be remanded because the record “provides no explanation” for the amounts claimed.

D. Scope of Remand and Closing Observations

The People suggest that on remand, the trial court should be given an opportunity to explain its restitution award in greater detail and, if necessary, hold a new restitution hearing. Appellant counters that the case “should not be remanded in an open-ended fashion that affords Soldano the opportunity to concoct new evidence after his old evidence was discovered to be insufficient and even fraudulent.” A few observations are in order.

First, we see nothing in the record to suggest the Soldanos’ restitution claim was fraudulent. They did not provide sufficient details about their losses to permit appellate review and the evidence that was presented suggests they are not legally entitled to recover the amount claimed for the structural damage to their home. But it is apparent they suffered a substantial economic loss, including significant damage to their home, displacement from their home, and damage to many personal items. We agree with the People that the tone of the briefs filed on behalf of appellant, including the characterization of the Soldanos as “angry and greedy,” is “repugnant and unwarranted.” While we are cognizant of appellate counsel’s duty to raise meritorious issues on behalf of her client, in the future she would be well-advised to take the advice offered in a widely-used treatise on appellate practice: “[H]yperbole, exaggeration, belligerence, disrespect, and arguments belittling your opponent, the trial judge or the appellate court do nothing to advance your client’s position; quite the contrary, a shrill and abusive tone is more likely to diminish the persuasive force of your brief and ultimately injure your client’s case.” (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2015) ¶ 9:29, p. 9–9.)

Second, the trial court may and should permit the Soldanos to submit additional appropriate documentation for their claim on remand. (See *People v. Harvest* (2000) 84 Cal.App.4th 641, 650 [victim restitution does not constitute punishment for double

jeopardy purposes].) A victim’s right to restitution is seated in our state constitution and is “ ‘to be broadly and liberally construed.’ ” (*In re Johnny M.* (2002) 100 Cal.App.4th 1128, 1132.)

Third, on remand the trial court should consider that the economic loss for damaged property is to be valued at “the replacement cost of *like* property, or the actual cost of repairing the property when repair is possible.” (Welf. & Inst. Code, § 730.6, subd. (h)(1), italics added.) The People agree that under this provision, a victim is not entitled to restitution based on the value of new property when the property damaged was not in new condition. (*People v. Thygesen* (1999) 69 Cal.App.4th 988, 990–991, 995 [reversing order of restitution where the defendant was convicted of stealing a used cement mixer and ordered to pay victim restitution in an amount sufficient to purchase a new mixer rather than a used one; “ ‘[t]he [correct] award should have been predicated on the “replacement cost of like property” ’ ” because “ ‘the purpose of the restitution statute is to make the victim whole, not to give a windfall’ ”]; see *People v. Chappelone* (2010) 183 Cal.App.4th 1159, 1176–1177.) Restitution may also be based on the cost to repair damaged property, even if it exceeds the cost of replacement. (*In re Alexander A.* (2011) 192 Cal.App.4th 847, 856.) A record adequate for appellate review will include information about how USSA calculated its payments to the Soldanos for the loss of personal property.

III. DISPOSITION

The order awarding \$436,413.29 in restitution to Dominick Soldano is reversed and the case is remanded for further proceedings on the issue of victim restitution.

NEEDHAM, J.

We concur.

SIMONS, ACTING P.J.

BRUINIERS, J.

(A146273)